Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JOHN MAYO,

Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a defendant constructively denied the assistance of counsel during the time for filing a motion for new trial in state court where trial counsel is not aware that he is still counsel of record and provides no substantive representation?

2. Is the time for filing a motion for new trial a critical stage of a criminal proceeding to which the right to counsel attaches?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. THE COURT OF APPEALS ERRED IN HOLDING THAT A DEFENDANT IS NOT CONSTRUCTIVELY DENIED THE ASSISTANCE OF COUNSEL DURING THE TIME FOR FILING A MOTION FOR NEW TRIAL WHERE TRIAL COUNSEL IS NOT AWARE THAT HE IS STILL COUNSEL OF RECORD AND PROVIDES NO SUBSTANTIVE REPRESENTATION	5
II. THE COURT OF APPEALS ERRED IN SUGGESTING THAT THE TIME FOR FILING A MOTION FOR NEW TRIAL IS NOT A CRITICAL STAGE OF A CRIMINAL PROCEEDING TO WHICH THE RIGHT TO COUNSEL ATTACHES	9
CONCLUSION	13

INDEX TO APPENDICES

Page

Appendix A
Opinion of the United States Court of Appeals for the Fifth Circuit ..... App. 1

Appendix B
Memorandum and Order of the District Court .... App. 22

Appendix C
Order of the United States Supreme Court denying certiorari ..... App. 38

Appendix D
Order of the Texas Court of Criminal Appeals denying habeas corpus relief ..... App. 39

Appendix E
Findings of Fact, Conclusions of Law, and Order of the state district court ..... App. 40

Appendix F
Fifth Circuit Order denying rehearing ..... App. 45

TABLE OF AUTHORITIES

Page

CASES

Bell v. Cone, 122 S.Ct. 1843 (2002) 5

Bell v. Hill, 190 F.3d 1089 (9th Cir. 1999), cert. denied, 529 U.S. 1004 (2000) 12

Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) (en banc), cert. denied, 122 S.Ct. 2347 (2002) 5, 8, 12

Burnett v. State, 959 S.W.2d 652 (Tex. App. – Houston [1st Dist.] 1997, pet. ref'd) 10

Evitts v. Lucey, 469 U.S. 387 (1985) 11, 12

Ex parte Axel, 757 S.W.2d 369 (Tex. Crim. App. 1988) 3

Ex parte Bronson, 254 S.W.2d 117 (Tex. Crim. App. 1952) 3

Frame v. State, 615 S.W.2d 766 (Tex. Crim. App. 1981) 7

Gideon v. Wainwright, 372 U.S. 335 (1963) 10, 12

Hanson v. State, 11 S.W.3d 285 (Tex. App. – Houston [14th Dist.] 1999, pet. ref'd) 10

Johnston v. Mizell, 912 F.2d 172 (7th Cir. 1990), cert. denied, 498 U.S. 1094 (1991) 10

Kitchen v. United States, 227 F.3d 1014 (7th Cir. 2000) 10

Massingill v. State, 8 S.W.3d 733 (Tex. App. – Austin 1999, no pet.) 10

Mempa v. Rhay, 389 U.S. 128 (1967) 11, 12

Menefield v. Borg, 881 F.2d 696 (9th Cir. 1989) 10

TABLE OF AUTHORITIES – Continued

Page

Oldham v. State, 977 S.W.2d 354 (Tex. Crim. App. 1998), cert. denied, 525 U.S. 1181 (1999) 10

Prudhomme v. State, 28 S.W.3d 114 (Tex. App. – Texarkana 2000, no pet.) 10

Robinson v. Norris, 60 F.3d 457 (8th Cir. 1995), cert. denied, 517 U.S. 1115 (1996) 10

State v. Holloway, 886 S.W.2d 482 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd) 3, 7

Strickland v. Washington, 466 U.S. 668 (1984) 7, 8

Teague v. Lane, 489 U.S. 288 (1989) 9, 12

Thomas v. State, 796 S.W.2d 196 (Tex. Crim. App. 1990) 3, 7

Trevino v. State, 565 S.W.2d 938 (Tex. Crim. App. 1978) 10

United States v. Cronic, 466 U.S. 648 (1984) 5, 7, 8, 9

CONSTITUTION

U.S. CONST. amend. VI 2, 9

U.S. CONST. amend. XIV 2

RULE

TEX. R. APP. PROC. 21 11

PETITION FOR A WRIT OF CERTIORARI

John Mayo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus relief is reported at 287 F.3d 336 (Appendix A). The Memorandum and Order of the district court is not reported (Appendix B). The Order of the Supreme Court denying certiorari in the state habeas corpus proceeding is reported at 522 U.S. 998 (Appendix C). The Order of the Texas Court of Criminal Appeals is not reported (Appendix D). The Findings Of Fact, Conclusions Of Law, and Order of the state district court is not reported (Appendix E). The Order of the Fifth Circuit denying rehearing is not reported (Appendix F).

JURISDICTION

The Fifth Circuit affirmed the district court's denial of habeas corpus relief on March 28, 2002, and denied rehearing on June 18, 2002. This petition is filed within 90 days of the latter date. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner, charged with aggravated sexual assault and aggravated kidnapping, was represented at trial by retained counsel, Paul Mewis, assisted by Cynthia Henley. Unbeknownst to the court and counsel, one juror had a final conviction for misdemeanor theft, which was discoverable as a public record in the Harris County Courthouse. Had the juror disclosed the theft conviction on her juror questionnaire, when she was questioned in the central jury room, or during the voir dire examination, she would have been released, as she was absolutely disqualified from jury service under Texas law.

After petitioner was convicted and sentenced, he told Mewis that he wanted to appeal. Mewis' contract provided that his representation of petitioner would terminate with the jury's verdict. He told petitioner to hire another lawyer and he did no further legal work. Specifically, he did not investigate the grounds for a new trial, including whether any juror had a conviction that disqualified her from jury service. He did not move to withdraw as counsel because

he was unaware that Texas law required him to continue to represent petitioner following the sentencing until the court permitted him to withdraw or substituted counsel in his place. *See Ex parte Axel*, 757 S.W.2d 369, 373-74 (Tex. Crim. App. 1988).

Mewis visited petitioner in jail about three weeks later and learned that he could not afford to hire counsel. Three days before the time expired to file a motion for new trial and notice of appeal, Mewis arranged for petitioner to be brought to court to file a pro se notice of appeal, sign an affidavit of indigency, and request the appointment of appellate counsel. That same day, the court appointed Will Gray and mailed him notice of the appointment. Gray did not learn of the appointment until the time had expired to file a motion for new trial.

Petitioner did not discover the juror's theft conviction in time to file a motion for new trial and preserve the issue for appeal. Had petitioner raised the juror disqualification issue in a motion for new trial and proven that the juror had a theft conviction, the trial court would have been required to grant a new trial or the conviction would have been reversed on appeal. *See Thomas v. State*, 796 S.W.2d 196, 197 (Tex. Crim. App. 1990); *State v. Holloway*, 886 S.W.2d 482, 484 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd). Texas law does not authorize habeas corpus relief on the ground that a disqualified juror served. *Thomas*, 796 S.W.2d at 199; *Ex parte Bronson*, 254 S.W.2d 117, 121 (Tex. Crim. App. 1952).

Petitioner's conviction was affirmed on appeal. *Mayo v. State*, 1992 WL 91218 (Tex. App. – Houston [14th Dist.] 1992, pet. ref'd). He filed a state habeas corpus petition in

1997 alleging that he was constructively denied the assistance of counsel during the time for filing a motion for new trial. The state district court, after a hearing, concluded that he "was not denied assistance of counsel during the time for filing a motion for new trial, as Paul Mewis remained attorney of record." The Texas Court of Criminal Appeals denied habeas corpus relief on the findings of the district court. *Ex parte Mayo*, writ no. 35,090-01 (Tex. Crim. App. 1997). The United States Supreme Court denied certiorari. *Mayo v. Texas*, 522 U.S. 998 (1997). The federal district court and a divided panel of the Fifth Circuit held that the state courts' conclusion that petitioner had the assistance of counsel during the time for filing a motion for new trial was not an unreasonable application of federal law, as established by the Supreme Court, nor was it based on an unreasonable determination of the facts in light of the evidence presented. The panel majority further suggested that even if petitioner was denied the assistance of counsel, the time for filing a motion for new trial is not a critical stage of a criminal proceeding to which the right to counsel attaches.

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT A DEFENDANT IS NOT CONSTRUCTIVELY DENIED THE ASSISTANCE OF COUNSEL DURING THE TIME FOR FILING A MOTION FOR NEW TRIAL WHERE TRIAL COUNSEL IS NOT AWARE THAT HE IS STILL COUNSEL OF RECORD AND PROVIDES NO SUBSTANTIVE REPRESENTATION.

Where counsel is absent at a critical stage of a criminal proceeding, the defendant is constructively denied the assistance of counsel, and prejudice is presumed. *United States v. Cronic*, 466 U.S. 648, 659 (1984); *Bell v. Cone*, 122 S.Ct. 1843, 1850 (2002). The en banc Fifth Circuit recently held that a defendant was constructively denied the assistance of counsel where his lawyer slept periodically during the guilt phase of his trial. *Burdine v. Johnson*, 262 F.3d 336, 341 (5th Cir. 2001) (en banc), *cert. denied*, 122 S.Ct. 2347 (2002). With only a nod to *Burdine*, the panel majority held that the state courts did not unreasonably apply clearly established federal law or make unreasonable findings of fact in concluding that Mewis functioned as counsel during the time for filing a motion for new trial.[1] This Court should grant certiorari to determine whether a lawyer, who does not realize he is still representing the defendant and provides no substantive representation

[1] Judge DeMoss, in dissent, would have held that "the state courts' conclusion that Mayo was represented by counsel during the time for filing a post-trial, pre-appeal motion for new trial is unreasonable in light of the evidence presented in the State court proceedings." *Mayo*, 287 F.3d at 343.

during the time for filing a motion for new trial, has rendered the "assistance" of counsel.

The majority concluded that Mewis' ignorance of his legal duty to continue to represent petitioner after the sentencing did not "transform an error into the 'denial' or 'absence' of counsel [as] Mewis in fact represented his client post-trial by taking steps to ensure the appointment of appellate counsel;" thus, petitioner's right to a first appeal was not undermined. *Mayo*, 287 F.3d at 340, and n.4. This holding implicates the fundamental question of what constitutes the assistance of counsel.

Mewis did not provide post-trial "assistance" of counsel in any meaningful sense of the term. Three days before the deadline for filing a motion for new trial and notice of appeal, he notified the trial court that he would not represent petitioner on appeal, that petitioner was indigent, and that the court needed to appoint counsel. By then, it was too late for any lawyer to investigate non-record issues that had to be raised in a motion for new trial or forever forfeited.

What is significant for present purposes is that Mewis was not merely unaware of his legal duty to investigate the grounds for a new trial; he was unaware that he was still petitioner's lawyer. In essence, he was "absent" during this stage of the proceedings. Notifying the court that he would not represent petitioner and requesting the appointment of appellate counsel did not constitute substantive representation; from his perspective, he was merely helping a former client obtain representation in the future.

The majority's conclusion that Mewis' inertia did not undermine petitioner's right to appeal cannot withstand scrutiny. The 30-day period following the sentencing was petitioner's only opportunity to raise non-record issues

such as juror disqualification. Without the assistance of counsel, he could not preserve this issue for appeal.

The majority veered off course by focusing on whether Mewis could have questioned the veniremembers about their prior convictions during the voir dire examination or investigated same during recesses at the trial. *Mayo*, 287 F.3d at 341.[2] Assuming *arguendo* that Mewis could have done so, that does not resolve whether petitioner had the assistance of counsel during the time for filing a motion for new trial.[3]

The majority applied the wrong standard of review in concluding that because petitioner could not establish ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), he could not establish the constructive denial of counsel under *United States v. Cronic*, *supra*. *Mayo*, 287 F.3d at 341. The majority observed, "That Mayo's [sic] conduct did not violate *Strickland* reinforces the conclusion that no basis for a presumption of prejudice – the prerequisite of a denial of

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[2] An inquiry into a veniremember's criminal record during the voir dire examination is unlikely to produce new information. A veniremember who lied in the juror questionnaire and to the presiding judge in the central jury room is not likely to disclose a conviction to the lawyers during the voir dire examination. Furthermore, once the testimony starts, counsel should focus on trying the case, not on investigating ancillary matters that he can investigate after the trial. Thus, the majority erred in concluding that there was "no necessary connection between Mewis' alleged oversight and the post-trial period." *Id.* at 340.

[3] Competent appellate counsel routinely conducts this type of post-trial investigation during the time for filing a motion for new trial, occasionally with a favorable result. *See Frame v. State*, 615 S.W.2d 766 (Tex. Crim. App. 1981); *Thomas v. State*, *supra*; *State v. Holloway*, *supra*.

counsel under *Cronic* – exists here." *Id.* at n.5. That a claim would fail under *Strickland* has never been and is not a reason for it to fail under *Cronic*. Otherwise, the Fifth Circuit would have denied relief in *Burdine*, where the defendant could not show that he was harmed by counsel's periodic naps during the trial.

The appropriate focus should be on what counsel thought and did during the time for filing a motion for new trial, not on what he could have done during the voir dire examination and the trial. Petitioner does not contend that Mewis' trial performance was deficient; rather, petitioner contends that Mewis was "absent" as counsel during the time for filing a motion for new trial because he did not know that he still represented petitioner. The majority addressed a *Strickland* issue – whether it was deficient performance not to question the veniremembers about their criminal records or investigate same during the trial – instead of a *Cronic* issue – whether petitioner was denied the assistance of counsel where counsel of record did not know that he still represented petitioner and failed to perform the basic functions of post-trial, pre-appeal counsel. In short, because *Cronic* applied to *Burdine* – where counsel knew he represented the defendant, was present at the trial, but slept periodically – then it must also apply to petitioner – whose counsel did not know he was counsel of record and failed to provide any substantive representation.

The dissent correctly observed that petitioner conclusively proved in the state habeas corpus proceeding that he was not represented by counsel during the time for filing a motion for new trial. *Mayo*, 287 F.3d at 342-43. The dissent would have held that the state courts' conclusion to the contrary was unreasonable in light of the evidence

presented. This Court should grant certiorari to determine whether a lawyer who is unaware that he is still counsel of record and provides no substantive representation during the time for filing a motion for new trial has rendered the "assistance" of counsel within the meaning of the Sixth Amendment.

II.

THE COURT OF APPEALS ERRED IN SUGGESTING THAT THE TIME FOR FILING A MOTION FOR NEW TRIAL IS NOT A CRITICAL STAGE OF A CRIMINAL PROCEEDING TO WHICH THE RIGHT TO COUNSEL ATTACHES.

Petitioner's contention that he was denied the assistance of counsel during the time for filing a motion for new trial presupposes that he had a right to counsel during that stage of the proceedings. The majority avoided answering this question by concluding that Mewis did provide the assistance of counsel during the time for filing a motion for new trial. *Mayo*, 287 F.3d at 339-40. However, the majority further suggested in *dicta* that this time frame is not a critical stage, and that application of *Cronic* would constitute a new rule under *Teague v. Lane*, 489 U.S. 288 (1989). *Id.* at n.3. The former conclusion conflicts in principle with well-established Supreme Court precedent, not to mention every federal circuit court and Texas court of appeals decision regarding this issue. The latter conclusion is incorrect under *Teague*, and conflicts with federal circuit authority. Should this Court grant certiorari to decide whether petitioner was denied the assistance of counsel, it must also decide whether he was entitled to that assistance during the time for filing a motion for new trial.

The Texas Court of Criminal Appeals has expressly reserved whether the time for filing a motion for new trial is a critical stage of a criminal proceeding to which the right to counsel attaches. *Oldham v. State*, 977 S.W.2d 354, 360-61 (Tex. Crim. App. 1998), *cert. denied*, 525 U.S. 1181 (1999). However, every Texas court of appeals that has decided the issue has held that it is a critical stage. *See Prudhomme v. State*, 28 S.W.3d 114 (Tex. App. – Texarkana 2000, no pet.); *Hanson v. State*, 11 S.W.3d 285 (Tex. App. – Houston [14th Dist.] 1999, pet. ref'd); *Massingill v. State*, 8 S.W.3d 733 (Tex. App. – Austin 1999, no pet.); *Burnett v. State*, 959 S.W.2d 652 (Tex. App. – Houston [1st Dist.] 1997, pet. ref'd).[4] Every federal circuit court to decide this issue has agreed. *See Robinson v. Norris*, 60 F.3d 457 (8th Cir. 1995), *cert. denied*, 517 U.S. 1115 (1996); *Kitchen v. United States*, 227 F.3d 1014 (7th Cir. 2000); *cf. Johnston v. Mizell*, 912 F.2d 172 (7th Cir. 1990), *cert. denied*, 498 U.S. 1094 (1991) (interpreting Illinois law); *Menefield v. Borg*, 881 F.2d 696 (9th Cir. 1989) (interpreting California law). The majority cited no case holding that this time frame is not a critical stage.

The principles underlying well-settled Supreme Court precedent compel the conclusion that the time for filing a motion for new trial is a critical stage. A defendant is entitled to counsel at every stage of a criminal proceeding where his substantial rights are involved. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). The right to

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[4] The rationale of these cases is that because the hearing on a motion for new trial is a critical stage pursuant to *Trevino v. State*, 565 S.W.2d 938, 940 (Tex. Crim. App. 1978), logic dictates that the time for filing the motion is also a critical stage.

counsel attaches to all proceedings at which the failure to pursue strategies or remedies can result in the loss of significant rights. *Mempa v. Rhay*, 389 U.S. 128, 135 (1967). A defendant has a constitutional right to counsel during his first appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). A motion for new trial is part of the appellate process and is governed by Texas Rule of Appellate Procedure 21. It is a prerequisite to presenting a point of error on appeal where it is necessary to adduce facts not already in the record. TEX. R. APP. PROC. 21.2. It is the procedural vehicle to raise issues such as jury misconduct or juror disqualification, which must be investigated following the conviction and developed at a hearing. TEX. R. APP. PROC. 21.3. The defendant must file the motion within 30 days of the sentencing. TEX. R. APP. PROC. 21.4. He must present the motion to the trial court within 10 days of filing it and must obtain a ruling within 75 days of the sentencing. TEX. R. APP. PROC. 21.6.

Petitioner was confined in jail following his conviction. Clearly, he required the assistance of counsel to investigate whether there were grounds for a new trial and, if so, to prepare a motion, timely file it, and obtain a hearing. Supreme Court precedent compels the conclusion that this time frame is a critical stage of a criminal proceeding that requires the assistance of counsel.[5]

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[5] The majority suggested in *dicta* that this issue "has no clearcut practical answer" and that counsel's only duty following the sentencing is to file a timely notice of appeal. *Mayo*, 287 F.3d at 339, n.3. This is an extremely narrow view of counsel's post-trial obligations. The 30-day period following the sentencing is the only time to investigate jury misconduct and newly discovered evidence, and the logical time to investigate juror disqualification.

The majority also would have held that the *Teague* doctrine bars relief because applying *Cronic* to petitioner's case would establish a new rule of federal law. *Mayo*, 287 F.3d at 339, n.3. The majority misinterpreted *Teague*. A case announces a "new rule" within the meaning of *Teague* if the result was not dictated by precedent existing at the time the defendant's conviction became final on appeal. *Teague*, 489 U.S. at 301. Petitioner's case does not break new ground, as he relies on *Gideon*, *Mempa*, and *Evitts*, well-settled Supreme Court precedent establishing that a defendant is entitled to counsel at every stage of a criminal proceeding where his substantial rights are involved, from arrest through the first appeal. A motion for new trial is part of the appellate process in Texas. When petitioner's conviction became final in 1992, Supreme Court precedent dictated that he was entitled to counsel during the time for filing a motion for new trial. Thus, he does not seek the adoption of a new rule of federal law. *Bell v. Hill*, 190 F.3d 1089, 1090-93 (9th Cir. 1999), *cert. denied*, 529 U.S. 1004 (2000) (*Teague* does not preclude federal habeas corpus relief, as Supreme Court precedent compelled conclusion that defendant entitled to counsel during time for filing motion for new trial); *cf. Burdine*, 262 F.3d at 341-45 (*Teague* does not bar federal habeas corpus relief on "sleeping counsel" claim).

This issue is not ripe unless this Court holds that petitioner was denied the assistance of counsel during the time for filing a motion for new trial. In that event, the Court must consider this issue or, at the very least, remand to the Fifth Circuit for further consideration.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-20941

JOHN MAYO,

Petitioner-Appellant,

versus

JANIE COCKRELL, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Mar. 28, 2002)

Before JONES, SMITH, and DeMOSS, Circuit Judges.

EDITH H. JONES, Circuit Judge:

This court granted a certificate of appealability to permit John Mayo's appeal from a denial of § 2254 habeas relief on the claim that he was constructively deprived of legal counsel at a critical stage of his prosecution, the period during which a new trial could be sought. Texas courts denied relief on this claim, as did the federal district court. The issue before us, pursuant to AEDPA standards, is whether the state courts' decision "was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court

of the United States . . . ," or was based on an unreasonable determination of the facts in light of the state court record. 28 U.S.C. § 2254(d). Mayo rests his claim entirely on *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, (1984), and its progeny. Finding no basis to grant relief on these facts under *Cronic,* we affirm.

BACKGROUND

Mayo kidnapped, raped and sexually assaulted a Houston, Texas, woman in May 1989. He was convicted in March 1991 of aggravated kidnaping and aggravated sexual assault, and he received sentences of 20 and 50 years' imprisonment, respectively, for those offenses.

The facts pertinent to this case, which we paraphrase, are succinctly reported by the state habeas court:[1]

Jacquelyn Barnes, a veniremember for Mayo's trial, represented on her juror questionnaire that she had never been accused in a criminal case. Before the veniremembers were brought to the courtroom, the presiding judge in the central jury room asked whether they had ever been convicted of any felony or theft. Barnes either responded in the negative or remained silent; otherwise, she would not have accompanied the panel to the courtroom.

Mayo was represented at trial by retained counsel Paul Mewis, assisted by Cynthia Henley. Neither the prosecutor nor defense counsel asked the veniremembers

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[1] The state court held a hearing on July 24, 1997, and prepared its findings of fact and conclusions of law based on testimony and documentary evidence.

whether they had been convicted of any felony or theft, in reliance on the answers in the jury questionnaires and their knowledge that the veniremembers had already been qualified on this question in the central jury room. Barnes became a juror.

Unbeknownst to the parties and attorneys, Barnes had a final conviction for misdemeanor theft dating from 1977, which was discoverable as a public record in Harris County, Texas. Had Barnes disclosed her conviction during voir dire examination, the attorneys would have challenged her for cause, as she was absolutely disqualified from jury service under Texas law. TEX. CODE CRIM. PROC. ANN. art. 35.19 (1989); *Frame v. State,* 615 S.W. 2d 766, 769 (Tex. Crim. App. 1981).

Mayo was convicted and sentenced. Mewis's contract provided that his legal representation of Mayo would terminate with the jury's verdict. After sentencing, Mayo indicated his desire to appeal. Because Mewis did not handle appeals, he advised Mayo to hire another lawyer.

Mewis took no further action in the case because he assumed that Mayo would hire another lawyer. Neither Mewis nor Henley (as Mewis's assistant) investigated jury misconduct, checked the local criminal records of the jurors, or investigated or filed a motion for new trial.

Mewis did not move to withdraw as counsel because he was unaware that Texas law required him to continue to represent Mayo following conviction until such time as the court permitted him to withdraw or substituted counsel. *Ex parte Axel,* 757 S.W.2d 369, 373-74 (Tex. Crim. App. 1988).

Nevertheless, when Mewis had not heard from a prospective appellate lawyer after about three weeks, he met with Mayo in jail to determine whether another lawyer had been hired. Mayo said he was indigent. On April 4, 1991, three days before the time expired to file a motion for new trial and notice of appeal, Mewis assured that Mayo was brought to court, that he filed a notice of appeal, and that he signed an indigency affidavit requesting court-appointed appellate counsel. That same day, the court appointed Will Gray as appellate counsel and mailed him notice of the appointment. Gray did not, however, learn of his appointment until the time had expired to file a motion for new trial.

No attorney discovered Barnes's theft conviction in time to file a motion for new trial or to raise the issue on appeal. Had counsel filed a motion for new trial and proven that Barnes was absolutely disqualified from serving as a juror, the trial court would have had to grant a new trial, or the conviction would have been reversed on appeal. *Thomas v. State,* 796 S.W.2d 196, 197 (Tex. Crim. App. 1990); *State v. Holloway,* 886 S.W.2d 482, 484 (Tex. App. – Houston [1st Dist.] 1994). Under Texas law, however, Mayo is not entitled to obtain habeas corpus relief on a claim involving a disqualified juror. *Thomas,* 796 S.W.2d at 199; *Ex parte Bronson,* 254 S.W.2d 117, 121 (Tex. Crim. App. 1952)

The state habeas court concluded that Mayo "was not denied assistance of counsel during the time for filing a motion for new trial, as Paul Mewis remained attorney of record." The Texas Court of Criminal Appeals denied Mayo's application for habeas corpus relief without written order on the findings of the trial court. The federal district court

denied relief under § 2254, and this appeal followed after a COA was granted.

DISCUSSION

This case turns on whether the state courts' conclusion that Mayo was not denied the assistance of counsel during the period for filing a new trial motion was an unreasonable application of Federal law, as established by the Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d).

Mayo's argument begins with the proposition that criminal defendants are constitutionally entitled to effective assistance of counsel at every "critical stage" of prosecution and through the conclusion of direct appeal. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, (1984); *Evitts v. Lucey,* 469 U.S. 387, 396, 105 S.Ct. 830, 836 (1985). A defendant whose attorney provides no meaningful assistance may, however, be constructively denied the assistance of counsel. *United States v. Cronic,* 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 (1984). In Mayo's view, his lawyer's failure to research or file a motion for new trial was the equivalent of denying him counsel for the purpose of challenging Ms. Barnes's qualifications as a juror.

The initial problem with this argument is that, from the standpoint of AEDPA, its conclusion does not necessarily follow from its premises. Few precedents exist explaining whether the period for filing a motion for new trial is a "critical stage" of prosecution to which the right to counsel attaches. The Texas Court of Criminal Appeals, for instance, expressly withheld ruling on that issue, although

lower Texas courts have described the post-trial period as "critical." *Compare Prudhomme v. State,* 28 S.W.3d 114, 121 (Tex. App. – Texarkana 2000), *with Smith v. State,* 17 S.W.3d 660, 663 n.3 (Tex. Crim. App. 2000), *and Oldham v. State,* 977 S.W.2d 354, 360-61 (Tex. Crim. App. 1998). Several federal courts of appeals have held that there is no constitutional right to counsel for post-appeal motions for new trial. *United States v. Tajeddini,* 945 F.2d 458, 470 (1st Cir. 1991), *abrogated on other grounds by Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029 (2000); *United States v. Lee,* 513 F.2d 423, 424 (D.C. Cir. 1975); *United States v. Birrell,* 482 F.2d 890, 892 (2d Cir. 1973). But three federal courts of appeals have held, on particular facts, that the motion for new trial phase is a critical stage of the prosecution. *Kitchen v. United States,* 227 F.3d 1014, 1018-19 (7th Cir. 2000); *Robinson v. Norris,* 60 F.3d 457, 459-60 (8th Cir. 1995); *Menefield v. Borg,* 881 F.2d 696, 699 (9th Cir. 1989). The district court here seized on the absence of "clearly established Federal law, as determined by the Supreme Court . . . .," and concluded that the period for filing a motion for new trial is not clearly a critical phase; hence, the state courts did not unreasonably reject Mayo's habeas claim.[2]

Unfortunately for Mayo, his position succeeds only if the right to counsel clearly and fully attaches to the post-trial, pre-appeal phase of prosecution. But it is unnecessary, in resolving this appeal, to render such a broad

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[2] Mayo proceeded in state court and in this court solely on the theory that he was denied counsel pursuant to *Cronic* and not, under *Strickland,* that his attorney was constitutionally ineffective.

decision.[3] Instead, we focus on the state court finding that Mayo was not denied counsel during the post-trial phase.

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[3] The broad question has no clearcut practical answer. Having counsel during the motion for new trial phase may or may not be necessary to preserving the defendant's rights to a fair trial and effective appeal. Investigating juror misconduct, for instance, may be, but is not necessarily, feasible only after the jury has been discharged. Another type of post-trial motion may challenge the effectiveness of trial counsel, but such a claim may better be raised in a habeas corpus petition, after the results of the alleged errors have been ascertained on appeal. Other types of claims may justify the discretionary grant of a new trial but need not be raised in that fashion in order to preserve them for appeal. Hence, unlike phases of the prosecution during which attorney representation has been deemed "critical" by the Supreme Court – arraignment; gaps in trial that afford the opportunities for consultation with the defendant; the introduction of evidence pertinent to the defendant; direct appeal – the post-trial, pre-appeal phase seems, in the absence of a specific claim, to demand representation by counsel at a minimum only for filing a timely notice of appeal. (Mewis fulfilled his responsibility to Mayo for this purpose.)

Accordingly, to grant Mayo's petition would extend the Supreme Court's decision in *Cronic*. The Court explained in *Cronic* that a criminal defendant, even though formally represented by counsel, may suffer an actual or constructive denial of representation in three circumstances: where counsel is totally absent or is prevented from assisting the accused during a critical stage; where counsel has a conflict of interest; and where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. The circumstances of denial must justify a presumption of prejudice. *Cronic*, 466 U.S. at 659, 104 S.Ct. at 2046. In *Burdine*, this court held that when defense counsel slept for "not insubstantial periods of time" during the guilt phase of the capital murder trial, the defendant was constructively denied counsel. *Burdine v. Johnson*, 262 F.3d 336, 341 (5th Cir. 2001) (en banc). Nothing in the majority opinion in *Burdine* speaks to a Sixth Amendment claim arising in the post-trial, pre-appeal phase of a non-capital prosecution. Further, as has been shown, a priori judgment about the necessity of counsel during that phase is impossible. Under the terms of *Cronic* or *Burdine*, then, Mayo's broad claim fails for lack of a demonstration that prejudice is so likely to occur if counsel is "absent" during this phase as to render individual consideration of

(Continued on following page)

This finding is not legally or factually unreasonable. Under Texas law, Mewis was bound to represent Mayo until the trial court permitted him to withdraw or appointed a new attorney.[4] That Mewis was unaware of his legal responsibility does not transform an error into the "denial" or "absence" of counsel. Mewis in fact represented his client post-trial by taking steps to ensure the appointment of appellate counsel.

The only asserted flaw in Mewis's legal representation was his failure to investigate the criminal records of Mayo's jury, to unearth a thirteen-year-old misdemeanor conviction of one juror, and to use that technicality to

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claims unnecessary. Since *Cronic* as presently understood does not support a holding that the right to counsel inevitably continues during the post-trial phase of prosecution, the *Teague* doctrine would pose a bar to its extension here. *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060 (1989). Even in *Burdine,* the court, conscious of *Teague,* went out of its way both to explain that it articulated no "new rule" and to limit the decision to its specific facts. *Burdine,* 262 F.3d at 349. *Burdine* offers no hope that other habeas defendants may succeed in obtaining case-specific relief under *Cronic* or *Teague.*

[4] Mayo's argument proves too much by conflating the attorney's alleged error or misjudgment with "denial" or "absence" of counsel under *Cronic. Cronic* went out of its way to stress that "only when circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's performance at trial." *Cronic,* 466 U.S. at 662, 104 S.Ct. at 2048. The alleged error here was not so temporally tied to the post-trial, pre-appeal phase as to justify a presumption of ineffectiveness at that stage. Cases relied on by Mayo are thus not on point because the denial of counsel and attorney incompetence on appeal, respectively, in those cases inevitably undermined the defendant's right to a first appeal. *See Blankenship v. Johnson,* 118 F.3d 312 (5th Cir.1997); *Lombard v. Lynaugh,* 868 F.2d 1475 (5th Cir.1989).

obtain a mistrial or new trial. For two reasons, this omission has no constitutional significance.

First, even if Mewis should have investigated the jurors' criminal histories, the investigation need not have awaited the outcome of trial. Mewis could have questioned the jurors on the subject during voir dire exam. Indeed, the voir dire examination provided the best opportunity to reveal disqualifying characteristics. Moreover, Mewis, armed with copies of the juror questionnaires, could have begun an investigation of the seated jurors by means of outside sources as soon as trial commenced. While the deadline for filing a motion for new trial fixes a completion date under Texas procedure for such an investigation, it does not constrain the initiation of inquiries into jurors' criminal records. There is no necessary connection between Mewis's alleged oversight and the post-trial period. This lack of connection is irreconcilable with any *Cronic* claim regarding that period.

Second, the facts demonstrate why Mayo declines to characterize his claim as resting on the *Strickland* test for constitutionally deficient legal representation. A *Strickland* claim arises only if the attorney's error falls outside the bounds of professional reasonableness. *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065. Mewis did not question prospective jurors about their criminal histories because he relied on pre-qualification for that precise point. Prequalification took place by means of written questionnaires and inquiries by the judge who conducts juror screening in the Houston courts' central jury room. It was not professionally unreasonable to rely on this dual screening mechanism. Surely the best evidence of the reasonableness of Mewis's conduct lies in the fact that the prosecutor, who had as much to lose as Mayo had to gain

from the belated identification of an unqualified juror, also relied on the pre-screening techniques. If Mewis's actions in failing to ask veniremembers about possible criminal records were not professionally unreasonable, it follows that the failure to conduct post-trial investigation and file a motion for new trial cannot have been deficient.[5]

Our conclusion may be stated narrowly. Whether or not the right to counsel attaches for some purposes during the post-trial, pre-appeal phase of the prosecution, Mayo was not constructively denied the assistance of counsel for purposes of filing a new trial motion solely to assert the disqualification of a juror, where (a) the disqualification might have been discovered earlier, and (b) Mayo's attorney could reasonably rely on Harris County's juror pre-screening procedures. The state courts did not unreasonably apply clearly established Federal law or reach unreasonable findings of fact in denying Mayo relief from his conviction.[6]

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[5] That Mayo's conduct did not violate *Strickland* reinforces the conclusion that no basis for a presumption of prejudice – the prerequisite of a denial of counsel under *Cronic* – exists here.

[6] The dissent finds unreasonable the state's conclusion that Mayo was represented by counsel during the post-trial, pre-appeal phase. The dissent bases its view on attorney Mewis's affidavit revealing his ignorance of the requirements of Texas law. Under the dissent's alchemy, it is hard to see how the line between *Cronic* and *Strickland* errors could be drawn, with the result that petitioners' heavy burdens of proving *Strickland* deficiency and prejudice would be lightened to the *Cronic* standard of "absence" and presumed prejudice. Were the dissent's position correct, the magnitude of Mayo's windfall here would be striking, since Mewis's conduct, which did not rise to the level of deficient representation under *Strickland,* would transmute into a habeas-demanding *Cronic* error.

The judgment of the district court is **AFFIRMED**.

DeMOSS, Circuit Judge, dissenting:

The majority concludes, as did the state habeas court, that John Mayo was not deprived of the assistance of counsel during the post-trial, pre-appeal time for filing a motion for new trial, despite the existence of affidavits from his attorneys attesting that they in fact did not represent Mayo during this period. Because I believe this conclusion to be unreasonable in light of the evidence presented in the State habeas proceeding, I respectfully dissent. Further, because I conclude that the post-trial, pre-appeal time for filing a motion for new trial is a "critical stage" in the proceedings, I would grant Mayo's request for habeas relief.

I. ASSISTANCE OF COUNSEL

The majority concludes that the state habeas court's finding that Mayo was not denied counsel during the post-trial, pre-appeal time for filing a motion for new trial was "not legally or factually unreasonable."[1] It reasons:

> Under Texas law, Mewis was bound to represent Mayo until the trial court permitted him to withdraw or appointed a new attorney. That Mewis was unaware of his legal responsibility does not

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[1] The state habeas court's entire analysis consisted of one sentence: "The applicant was not denied assistance of counsel during the time for filing a motion for new trial, as Paul Mewis remained attorney of record."

> transform an error into the "denial" or "absence" of counsel. Mewis in fact represented his client post-trial by taking steps to ensure the appointment of appellate counsel.

I have no quarrel with the majority's recognition that, as a matter of Texas law, trial counsel remains under a duty to continue representing his or her client until the court permits a withdrawal.[2] I am also cognizant that, under Texas law, "[w]hen a motion for new trial is not filed in a case, the rebuttable presumption is that it was considered by the appellant and rejected," and that the appellant carries the burden to "rebut the presumption that the appellant was represented by counsel." ***Oldham v. State***, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998).

However, "being under a duty to represent" and actually performing that duty are horses of a different color. Contrary to the majority's view, I believe it indisputable in this case that Mayo *did* rebut the presumption that he was represented by counsel during the time for filing a motion for new trial. Mayo presented two affidavits in support of his claim – one from Mewis, his trial attorney, and one from Gray, his appointed appellate attorney. Mewis's affidavit stated:

> On March 8, 1991, after Mr. Mayo was sentenced, he said that he wanted to appeal. Because I do not handle appeals, I told him to hire

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[2] This principle has been long recognized by the Texas Court of Criminal Appeals, ***e.g., Harrison v. State***, 516 S.W.2d 192, 192 (Tex. Crim. App. 1974), and is now codified in the Texas Code of Criminal Procedure. *See.* TEX. CODE CRIM. PROC. art. 26.04(j)(2).

another lawyer. I assumed that he would do so. I took no further action on his case.

When I had not heard from another lawyer after about three weeks, I went to see Mr. Mayo in jail to determine whether he had hired counsel for the appeal. He said that he could not afford to do so.

On April 4, 1991, three days before the time expired to file a motion for new trial and notice of appeal, I had Mr. Mayo brought to court. I filed a notice of appeal and had him sign an affidavit of indigency requesting the appointment of counsel on appeal. The court appointed Will Gray.

After Mr. Mayo was sentenced, I did not provide him with additional legal assistance because I did not intend to represent him on appeal. For all practical purposes, he did not have the assistance of counsel from the time that he was sentenced until Mr. Gray learned of the court appointment. As a result, no lawyer investigated the possible grounds for a motion for new trial.

Gray's affidavit stated:

The coordinator of the 263rd District Court customarily forwarded me a copy of the combination order appointing counsel and pauper's oath by United States Mail. . . . If the order were mailed on April 4, 1991, the earliest I could have received it would have been April 6, 1991.

I was not able to speak with the Appellant or file a motion for new trial by April 7, 1991.

In my view, these affidavits effectively rebut the presumption that Mayo was represented by counsel during the time period for filing a motion for new trial.[3] Mayo claims he was without representation; both Mayo's attorneys have sworn under oath that Mayo was without representation; and no motion for new trial was actually filed. I cannot conceive what more conclusive proof we could require Mayo to present to demonstrate he was in fact without representation.

In ***Ward v. State***, the Texas Court of Criminal Appeals emphasized that the "continuity of representation from trial to appeal is necessary to correct the ambiguity of representation which all too often follows a conviction." 740 S.W.2d 794, 797 (Tex. Crim. App. 1987). As the court explained, this is the precise reason for the rule requiring counsel to formally withdraw from representation. *Id.* & n.6. By failing to perform his statutory duty to formally withdraw from representing Mayo, Mewis subjected Mayo to this "ambiguity of representation," leaving Mayo without an attorney to counsel him or investigate grounds for filing a motion for new trial, and depriving the trial court of notice that it was necessary to appoint new counsel.

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[3] This evidence distinguishes this case from those where the Texas Court of Criminal Appeals has rejected similar claims. *See* ***Smith v. State***, 17 S.W.3d 660, 663 (Tex. Crim. App. 2000) ("We therefore assume, *absent a showing in the record to the contrary*, that appellant was adequately counseled regarding his right to file a motion for new trial.") (emphasis added); ***Oldham***, 977 S.W.2d at 363 ("There is nothing in the record to suggest that the attorney did not discuss the merits of a motion for a new trial with the appellant, which the appellant rejected.").

Because both Mayo's attorneys disclaim representing him during the post-trial, pre-appeal period for filing a motion for new trial, and because, in fact, no motion for new trial was filed, I would hold that Mayo has demonstrated that he was without representation during that period. The state habeas court's conclusion that Mayo was represented is "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Because the majority holds otherwise, I respectfully dissent.

II. CRITICAL STAGE

As the majority notes, before prejudice in this case can be presumed, Mayo must also show that the period he was without counsel was a "critical stage" of the proceedings. ***United States v. Cronic***, 466 U.S. 648, 659 (1984). The state habeas courts did not consider this issue. The panel majority likewise declined to reach this issue because its conclusion that Mayo had representation is dispositive of Mayo's appeal. Nonetheless, the majority opines, in dicta, that the time period for filing a motion for new trial is not a critical period under ***Cronic***. I disagree.

It is well settled that a defendant is constitutionally entitled to the assistance of counsel at every critical stage of the proceedings. ***E.g., id.; Michigan v. Jackson***, 475 U.S. 625, 629-30 (1986); ***United States v. Wade***, 388 U.S. 218, 224-25 (1967); ***White v. Maryland***, 373 U.S. 59, 60 (1963). Under the test articulated by the Supreme Court, whether a particular time period is a critical stage turns on an assessment of whether, at the time in question, "the accused required aid in coping with legal problems or assistance in meeting his adversary." ***United States v.***

Ash, 413 U.S. 300, 313 (1973). Stated another way, critical stages of the prosecution include all parts of the prosecution implicating substantial rights of the accused. ***Mempa v. Rhay***, 389 U.S. 128, 134 (1967).

While the Supreme Court has not considered precisely this issue, *every* federal circuit court to address the question has concluded that the post-trial, pre-appeal time period for filing a motion for new trial is a critical stage.[4] *See, e.g.*, ***Kitchen v. United States***, 227 F.3d 1014, 1019 (7th Cir. 2000); ***Williams v. Turpin***, 87 F.3d 1204, 1210 n.5 (11th Cir. 1996); ***Robinson v. Norris***, 60 F.3d 457, 460 (8th Cir. 1995); ***Menefield v. Borg***, 881 F.2d 696, 699 (9th Cir. 1989). And at least two other circuit courts, without expressly mentioning motions for new trial, have held that "the hiatus between the termination of trial and the beginning of an appeal" is a critical stage. ***Baker v. Kaiser***, 929 F.2d 1495,1499 (10th Cir. 1991); ***Nelson v. Peyton***, 415 F.2d 1154, 1157 (4th Cir. 1969).

Each of these circuits looked to the effect of a motion for new trial in the particular state at issue. Relying on principles articulated by the Supreme Court, each court ultimately concluded that this time period, under the relevant state law, qualified as a critical stage. Thus, while I find these cases instructive, I recognize that the proper

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[4] As the majority notes, several federal courts have held that there is no constitutional right to counsel for *post-appeal* motions for new trial that are merely collateral attacks. *See, e.g.*, ***United States v. Tajeddini***, 945 F.2d 458, 470 (1st Cir.1991), *overruled in part on other grounds by* ***Roe v. Flores-Ortega***, 528 U.S. 470 (2000). However, it cites no cases, and I have found none, holding that the post-trial, *pre-appeal* time period for filing a motion for new trial is not a critical stage.

focus here is on whether a defendant's substantive rights are affected during the post-trial, pre-appeal time period for filing a motion for new trial under Texas law. *See* ***Hamilton v. Alabama***, 368 U.S. 52, 53 (1961).

In Texas, Rule 21 of the Texas Rules of Appellate Procedure governs motions for new trial. Under this rule, a motion for new trial is a prerequisite to points raised on appeal "only when necessary to adduce facts not in the record." TEX. R. APP. PROC. 21.

The Texas Court of Criminal Appeals has never squarely addressed whether the time period for filing a post-trial, pre-appeal motion for new trial is a critical stage. It has held that a defendant is entitled to counsel at a *hearing* on a motion for new trial. ***Trevino v. State***, 565 S.W.2d 938, 940 (Tex. Crim. App. 1978). However, the two times it has been asked to consider whether the time for filing a motion for new trial was a critical stage, it has not reached the question. Instead, both times it concluded, as a threshold matter, that the defendant had failed to demonstrate that he or she was actually without counsel during this period. ***Smith v. State***, 17 S.W.3d 660, 663 (Tex. Crim. App. 2000) ("We hold that appellant has failed to overcome the presumption that he was adequately represented by counsel during the time for filing a motion for new trial."); ***Oldham***, 977 S.W.2d at 361 ("[T]he appellant has failed to show that she was denied counsel during the time limit for filing a motion for new trial.").

Nonetheless, *every* Texas court of appeals to consider the issue has concluded that, in Texas, the post-trial, pre-appeal time for filing a motion for new trial is a "critical stage." *See, e.g.*, ***Prudhomme v. State***, 28 S.W.3d 114, 119 (Tex. App. – Texarkana 2000, order); ***Massingill v. State***,

8 S.W.3d 733, 736 (Tex. App. – Austin 1999, no pet.); ***Hanson v. State***, 11 S.W.3d 285, 288 (Tex. App. – Houston [14th Dist.] 1999, pet. ref'd); ***Burnett v. State***, 959 S.W.2d 652, 656 (Tex. App. – Houston [1st Dist.] 1997, pet. ref'd). These courts all begin their analysis with the recognition that whether a particular stage is critical turns on an assessment of the usefulness of counsel to the accused at that time. *See* ***Ash***, 413 U.S. at 313; ***Upton v. State***, 853 S.W.2d 548, 553 (Tex. Crim. App. 1993). And several of these courts thoroughly explained their conclusion that, under Texas law, the time period at issue in this case *does* affect the substantive rights of the accused:

> The importance of counsel to a defendant immediately after conviction is recognized in both case law and statute. As previously discussed, an attorney's responsibilities to his client do not end with conviction. . . .
>
> A defendant "must comply with a myriad of procedural rules in order to perfect a meaningful appeal." While a motion for new trial is not a prerequisite to appeal in every case, for a meaningful appeal of some issues a defendant must prepare, file, present, and obtain a hearing on a proper motion for new trial in order to adduce facts not otherwise shown by the record. It is no more reasonable to require a defendant to perform these tasks without the assistance of counsel than it is to require him to represent himself at a new trial hearing.

Massingill, 8 S.W.3d at 736 (citations omitted).

> We find it to be indisputable that counsel can be useful in coping with legal problems in preparing, filing, presenting, and obtaining a hearing on a proper motion for new trial, because the

> process of preserving error with a motion for new trial is governed by a myriad of rules and can be a rather arduous task. . . . We also find it to be beyond dispute that a motion for new trial can be an extremely important tool for presenting an appeal. A motion for new trial is generally not a prerequisite to an appeal, but it can be indispensable for a meaningful appeal of issues which are reliant on facts outside the record.
>
> . . . .
>
> If a hearing on a motion for a new trial is a critical stage [as held by the Texas Court of Criminal Appeals in *Trevino*], then logic dictates that the time period for filing the motion is also a critical stage of the proceedings.

Prudhomme, 28 S.W.3d at 118-19 (citations and alterations omitted).

In sum, although the United States Supreme Court and the Texas Court of Criminal Appeals have never considered this precise issue, every federal circuit court and Texas state court to do so has relied on settled Supreme Court precedent to hold this time period is "critical." I am persuaded by the Texas courts of appeals' reasoning that, even though a motion for new trial is not *always* a prerequisite to an appeal in Texas, it undoubtedly can affect a defendant's substantial rights. Accordingly, I would hold that the post-trial, pre-appeal time period for filing a motion for new trial is a critical stage of the proceedings during which a defendant is constitutionally entitled to effective assistance of counsel. Moreover, based on settled Supreme Court precedent, because Mayo has shown he was denied the assistance of counsel during a critical stage of his trial, he is relieved of the burden to

show specific prejudice. ***Cronic***, 466 U.S. at 659 n.25 ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings."); Prejudice is presumed.[5] *Id.*

Finally, I disagree with the majority's conclusion that holding the post-trial, pre-appeal time period for filing a motion for new trial to be a critical stage would represent an impermissible extension of ***Cronic*** under ***Teague v. Lane***. Stated simply, ***Teague*** teaches us that a federal court reviewing a habeas petition cannot apply a new constitutional rule of law in granting relief to the defendant. 489 U.S. 288, 310 (1989). In ***Burdine v. Johnson***, we considered the scope of *Cronic*'s rule that mandates a presumption of prejudice when a defendant's counsel is absent during a critical stage of the proceedings. 262 F.3d 336, 345 (5th Cir. 2001). There our *en banc* Court stated that ***Cronic*** identified the "fundamental idea" under the Sixth Amendment that a "defendant must have the actual assistance of counsel at every critical stage of a criminal proceeding for the court's reliance on the fairness of that proceeding to be justified." *Id.*

Because I am convinced that the time period for filing a post-trial, pre-appeal motion for new trial fits comfortably within long-established Supreme Court precedent, I do not believe Mayo's claim is *Teague* barred. This is true even

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[5] For this reason, the majority's discussion about the merits of Mayo's motion for new trial should be irrelevant to our analysis. Contrary to the majority's suggestion, a defendant is not required to prove prejudice as a prerequisite to his or her entitlement to a presumption of prejudice.

though the Supreme Court has never expressly designated this particular stage as critical. *See* ***Williams v. Taylor***, 529 U.S. 362, 382 (2000) ("[A]s our precedent interpreting ***Teague*** has demonstrated, rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule.") (Stevens, J., concurring).

Teague teaches us that a rule is "new" only if it "breaks new ground or imposes a new obligation on the States or the Federal Government." ***Teague***, 489 U.S. at 301. Here, the Supreme Court has clearly articulated standards for this Court to use in determining whether a stage is critical. Simply applying those standards does not amount to application of a "new rule."

III. CONCLUSION

I would hold that the state courts' conclusion that Mayo was represented by counsel during the time for filing a post-trial, pre-appeal motion for new trial is unreasonable in light of the evidence presented in the State court proceedings. Because the majority holds otherwise, I respectfully dissent. Further, because I believe that Mayo was without counsel during a critical stage of the proceedings, I would reverse the district court's judgment and remand to the state district court to permit Mayo to file an out-of-time motion for new trial under the state laws existing at the time of his conviction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN MAYO,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-97-3530
GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,	§	
	§	
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	§	
Respondent	§	

MEMORANDUM AND ORDER

(Filed Sep. 30, 1999)

Pending before the Court in the above referenced petition for federal writ of habeas corpus, pursuant to 28 U.S.C. § 2254, are cross motions for summary judgment filed by Respondent Gary L. Johnson (instrument #6, amended motion instrument #8) and by Petitioner John May (#7).

Petitioner was convicted of aggravated kidnapping and aggravated sexual assault on March 8, 1991. *State v. John Mayo*, Cause No. 530604, 263rd District Court of Harris County Texas. He was sentenced to a twenty-year prison term and a $10,000.00 fine on the kidnapping charge, and to a fifty-year prison term and a $10,000.00 fine on the assault charge. He filed a direct appeal, and his conviction was affirmed. *Mayo v. State*, No. A14-91-325-

CR. He then filed a petition for discretionary review, which was refused by the Texas Court of Criminal Appeals. He has exhausted state remedies in a state habeas proceeding on the single ground raised in his federal petition. Following an evidentiary hearing, the trial court issued findings of fact and conclusions of law and recommended denial of collateral relief, and the Texas Court of Criminal Appeals denied relief without written order on September 17, 1997, with a request for rehearing subsequently denied on October 8, 1997. *Ex parte Mayo*, No. 35,090-01 (Tex. Crim. App. 1997). The instant application for federal habeas relief was timely filed on October 23, 1997.

Petitioner's sole claim for federal habeas relief is that he was constructively denied assistance of counsel[1] during

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[1] "[A] critical question in assessing a Sixth Amendment right to counsel claim is whether the accused asserts that he received incompetent counsel, or none at all." *Childress v. Johnson*, 103 F.3d 1221, 1230 (5th Cir. 1997). "In certain Sixth Amendment contexts, prejudice is presumed." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). "Actual or constructive denial of the assistance of counsel altogether," whether at trial level or in a first appeal as of right, constitutes prejudice per se and is constitutional error and invalidates a defendant's conviction. *Penson v. Ohio*, 488 U.S. 75, 88 (1988); *United States v. Cronic*, 466 U.S. 648, 659 (1984) (holding that actual or constructive denial of counsel at a critical stage of a criminal trial constitutes prejudice per se and invalidates a defendant's conviction). The Supreme Court has explicitly noted that it "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 662 n.25 (1984). Nevertheless, "[a]part from [certain limited] circumstances . . . there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.* Examples of actual denials of

(Continued on following page)

a critical stage of the proceedings, i.e., the time for filing a motion for new trial. This Court finds that he has exhausted his state court remedies.

The standard of review under § 104(3) of the Antiterrorism and Effective Death Penalty Act of 1996

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counsel are the court's failure to grant a defendant's request for appointment of counsel or allowing counsel to withdraw without appointing a new attorney. *Coleman v. Thompson*, 501 U.S. 722, 742 (1991); *Penson*, 488 U.S. at 81-84. Constructive denials of counsel would include an attorney's total or near total derelictions in representation. *See, e.g., Cronic*, 466 U.S. at 659-60 (prejudice is presumed if counsel "fails to subject prosecution's case to meaningful adversarial testing" or is absent at a critical stage of the proceedings); *Lozada v. Deeds*, 498 U.S. 430, 432 (1991) (presuming prejudice when counsel failed to file notice of appeal); *Strickland*, 466 U.S. at 692 (prejudice presumed if counsel is burdened by an actual conflict of interest because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests"); *Tippins v. Walker*, 77 F.3d 682, 686 (2d Cir. 1996) (prejudice presumed where counsel slept through trial); *Castellanos v. United States*, 26 F.3d 717, 720 (7th Cir. 1994) (prejudice presumed where counsel failed to effectuate defendant's instruction to file a notice of appeal); *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) (prejudice presumed where defense counsel sat in silence throughout proceeding and acted as a "mere spectator"); *Sharp v. Puckett*, 930 F.2d 450, 451-52 (5th Cir. 1991) (standard *Strickland* analysis (determining if counsel's performance was deficient and if that deficiency prejudiced the defendant) is not applied when there has been actual or constructive complete denial of any assistance of appellate counsel); *Siverson v. O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985) (prejudice presumed where defense counsel was not in the courtroom at a critical stage of the trial).

The Fifth Circuit has indicated that "A constructive denial of counsel occurs . . . in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." *Childress*, 103 F.3d at 1229. Distinguishing "shoddy representation from no representation at all," the Fifth Circuit presumes prejudice only when the defendant shows that counsel "was not merely incompetent but inert." *Id.* at 103 F.3d at 1228-29.

("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), codified at 28 U.S.C. § 2254(d), enacted on April 24, 1996, applies here. Under the AEDPA, 28 U.S.C. § 2254(d) as amended, which applies a "reasonableness" inquiry[2] to state court decisions,

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

There has been no allegation that the state habeas court made an unreasonable determination of the facts and therefore section 2254(d)(1) governs here. Thus to prevail on his application for federal writ of habeas corpus, Petitioner must demonstrate that the state courts' resolution of his claim was "contrary to" or "involved an unreasonable application of" Supreme Court precedent.

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[2] *Mata v. Johnson*, 99 F.3d 1261, 1267, *vacated in part on rehearing*, 105 F.3d 209 (5th Cir. 1997).

Thus under subsection (d)(1), the federal court may grant habeas relief only where a state court's decision is contrary to "clearly established Supreme Court precedent. *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997). "In effect, a reasonable, good faith application of Supreme Court precedent will immunize the state court conviction from federal habeas reversal, even if federal courts later reject that view of the applicable precedent." *Mata*, 99 F.3d at 1268.

Under subsection (d)(2), federal habeas relief is only available where state court determinations of law or of mixed questions of law and fact are "unreasonable." *See, e.g., Carter v. Johnson*, 110 F.3d 1098, 1103 (5th Cir. 1997). The Fifth Circuit has defined unreasonable application of law to facts as follows:

> [W]e hold that an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Mata, 99 F.3d at 1266, *quoting Drinkard*, 97 F.3d at 769. Thus the "unreasonable application" standard does not consist of mere disagreement with a state court decision, because such would result in *de novo* review. *Carter*, 110 F.3d 1103 n.4. The Fifth Circuit has characterized the standard as "a somewhat hybrid standard of review that is probably most closely akin to the traditional 'clearly erroneous' standard that to any other established standard of review." *Mata*, 99 F.3d at 1267. Also, under subsection (d)(2), state court factual decisions may be

overturned on habeas review only to the extent that they are unreasonable in light of the evidence presented to the state court in prior proceedings. 28 U.S.C. § 2254(d)(2); *Carter*, 110 F.3d at 1104. *Id.* at 767. Furthermore, state court findings of fact are presumed to be correct under the amended 28 U.S.C. § 2254(e)(1) and may be rebutted by a petitioner only by clear and convincing evidence. *Carter v. Johnson*, 110 F.3d 1098, 1104, 1110 (5th Cir. 1997).

Thus in conjunction with § 2254(d), § 2254(e) produces the following effects. If the state courts reasonably determined questions of law, mixed questions of law and fact, and questions of fact, based upon the facts that were presented to them, no federal habeas relief is authorized and no further analysis of the claim is required. If the state courts reached an unreasonable legal determination, the federal court may review the legal issue and any mixed questions *de novo*. If the state courts made an unreasonable factual determination in view of the facts presented to them, the petitioner must show by clear and convincing evidence that the factual finding was incorrect.

Still in effect for foreclosure of federal habeas relief *inter alia* is the *Teague v. Lane* bar to retroactive application of the new constitutional rule of law of criminal procedure to a conviction that was final before the rule was announced. *Teague v. Lane*, 489 U.S. 288 (1989) (holding that new constitutional rules of criminal procedure will not be applicable to those cases which have become final before new rules are announced).

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c), *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The burden of proof then shifts to the nonmovant to show that summary judgment is not inappropriate. *Fields v. City of South Houston*, 922 F.2d 1183, 1187 (5th Cir. 1991).

The key facts here, as found by the state habeas district court, are as follows. Ex. A to Petition. Paul Mewis ("Mewis"), assisted by Cynthia Hinley, represented Petitioner through his trial in Cause Number 530604 in the 263d District Court of Harris County, Texas. From the beginning, Mewis's contract with Petitioner provided that Mewis' representation would extend only up to the jury verdict and would not cover any appeal. After Petitioner was convicted on March 8, 1991, Petitioner stated that he wished to appeal. Mewis advised Petitioner that Petitioner should obtain new counsel for appeal, and Mewis took no further action on the case, did not investigate grounds for a motion for new trial, and assumed Petitioner would find new representation. Mewis did not move to withdraw and was not aware that Texas law required him to continue to represent Petitioner on appeal until the court allowed him to withdraw or substituted other counsel in his place. When Mewis had not received a notice of the appearance of any appellate counsel by April 4, 1991, three days before expiration of the deadline for filing a motion for new trial, Mewis had Mayo brought to court to file a notice of appeal and sign an affidavit of indigency requesting appointment of appellate counsel. The Court appointed Will Gray ("Gray") to represent Petitioner and mailed Gray notice of appointment. Gray, however, did not receive notice until after the deadline expired, and therefore no motion for new trial was filed.

The basis for a motion for new trial would have been that juror Jacqueline Clewis Barnes ("Barnes") had been convicted of misdemeanor theft in 1977, and that conviction had never been set aside or otherwise challenged.[3] Transcript ("TR") of Evidentiary Hearing, Cause No. 530,604, 263d Judicial District Court of Harris County, July 24, 1997, at 4-6. Barnes failed to disclose that conviction either on the jury information form or during voir dire proceedings. *Id.* at 7-8.

Under Texas law, a person convicted of theft, of any degree, or of a felony, is absolutely disqualified from serving on a jury. Tex. Code Crim. Proc. Ann. arts. 35.16(a)(2) and 35.19(Vernon 1999)[4]; *Frame v. State*, 615

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[3] According to the state habeas district court's findings of fact, Ex. A to Petitioner, at 2,

> 5. At the time of trial, Barnes had a final conviction for misdemeanor theft. On November 9, 1977, she pled guilty to theft in Cause No. 5000358 in County Criminal Court at Law Number 2 of Harris County, Texas; her punishment was assessed at three days in jail and a fine of $200.00
>
> 6. Barnes [*sic*] prior conviction was discoverable as a public record in the office of the Harris County District Clerk.
>
> 7. During the trial, neither the applicant, Mewis, nor co-counsel, Cynthia Hinley, knew that Barnes had a prior theft conviction.
>
> 8. Had Barnes disclosed her conviction during voir dire examination, Mewis would have challenged her for cause as she was absolutely disqualified from jury service because of the theft conviction.

[4] Article 35.16 provides in relevant part,

> A challenge for cause is an objection to a particular juror, alleging some fact which renders him incapable or unfit to

(Continued on following page)

S.W.2d 766 (Tex. Crim. App. 1981). A defendant need not show harm to his case where a juror is absolutely disqualified. *Thomas v. State*, 796 S.W.2d 196, 199 (Tex. Ct. Crim. App. 1990) (en banc). Petitioner therefore argues that had Mewis filed a motion for new trial based on Barnes' conviction, the trial court would have been required to grant a new trial or the conviction would have been overturned on appeal. *State v. Holloway*, 886 S.W.2d 482, 486 (Tex. App. – Houston [1st Dist.] 1994 pet. ref'd), *cert. denied*, 516 U.S. 922 (1995); *Thomas v. State*, 796 S.W.2d 196, 197 (Tex. Ct. Crim. App. 1990) (en banc). Furthermore, the presence of an unqualified juror renders the jury's conviction void. Tex. Code Crim. Proc. Ann. 35.19 (Vernon 1999); *Holloway*, 886 S.W.2d at 483. Respondent contends that the applicable standard of review here is that for a sixth amendment ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984),[5] with its requirement that the petitioner

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serve in the jury. A challenge for cause may be made by either the State or the defense for any one of the following reasons:

. . . .

(2) That he has been convicted of theft or any felony. . . .

No juror shall be impaneled when it appears that he is subject to the second . . . ground[ ] of challenge for cause set forth above, although both parties may consent. All other grounds for challenge may be waived by the party or parties in whose favor such grounds exist.

Under Article 35.19,

No juror shall be impanelled when it appears that he is subject to the second . . . cause of challenge in Article 35.16, though both parties may consent.

[5] To support a claim for ineffective assistance of counsel, Petitioner must show both that his "counsel's representation fell below an

(Continued on following page)

"affirmatively prove" prejudice,[6] not the Texas rule of law that a defendant need not show harm to be entitled to reversal of his conviction on the ground that a juror was absolutely disqualified due to a felony or theft conviction under *Thomas*. Respondent maintains that Petitioner cannot satisfy the prejudice prong of *Strickland*. He further argues that constructive denial of counsel, with its presumption of harm, has only been found "under a few limited circumstances," i.e., "when counsel is either totally absent or is prevented by surrounding circumstances from providing the effective assistance the Sixth Amendment

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objective standard of reasonableness" and that "but for counsel's unprofessional errors, the result of the proceeding would have been different," i.e., that counsel's performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A petitioner's failure to establish either requirement will defeat his ineffectiveness claim. *Linecum v. Collins*, 958 F.2d 1271, 1278 (5th Cir. 1992). A court need not decide whether counsel's performance was deficient before reviewing the prejudice suffered by Petitioner as a result of the alleged incompetence. *Id.* at 697.

Under the first prong of the *Strickland* test, there is a strong presumption of counsel's competence: the reviewing court should apply a "heavy measure of deference" to an attorney's decisions from the attorney's perspective and should avoid retrospective analysis. *Id.* at 689. As long as counsel fulfilled his function . . . to make the adversarial testing process work in a particular case," the court should presume that counsel's significant decisions were reasonable at the time and that his assistance was adequate. *Id.* at 690. Decisions not to make particular investigations are presumed reasonable and fall within the "wide latitude" of counsel's discretion. *Id.* at 689.

[6] *Strickland*, 466 U.S. at 693. To demonstrate prejudice, a petitioner must show that (1) but for counsel's deficient professional performance, there is a reasonable probability that the result of the proceeding would have been different, and (2) that counsel's deficient performance rendered the trial fundamentally unfair. *Id.* at 694; *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

contemplates." *May v. Collins*, 948 F.2d 161, 167 (5th Cir. 1991), *citing United States v. Cronic*, 466 U.S. 648, 659 (1984), and *Strickland*, 466 U.S. at 692. Respondent insists that Petitioner was represented by Mewis during the time for filing a motion for new trial and that to the extent that counsel omitted or failed to file such a motion, Petitioner's claim is one for ineffective assistance. Petitioner must show, but cannot show, prejudice from such an omission, i.e., not only that the juror was disqualified, but also that Petitioner was denied a fair trial. *Lockhart*, 506 U.S. at 369-70.

Petitioner does not argue and makes no attempt to prove prejudice under *Strickland*, i.e., that the results of the trial would probably have been different had the juror been disqualified. Therefore his claim depends on a determination of presumptive prejudice because of actual or constructive denial of assistance of counsel during the period for filing a motion for new trial in violation of the sixth amendment.

After carefully reviewing the record and researching the applicable law, this Court concludes as a matter of law not raised by the parties that Petitioner's motion for summary judgment and application for federal writ of habeas corpus should be denied and summary judgment should be granted in favor of Respondent.

A threshold issue here is whether proceedings during the period for filing a motion for new trial are a "critical stage" of the prosecution requiring effective assistance of counsel under the sixth amendment. In his petition, Petitioner relied on *Oldham v. State*, 889 S.W.2d 461 (Tex. App. – Houston [14th Dist.] 1994, pet. dism'd as improvidently granted) (holding that failure to appoint counsel for

appeal until after the deadline for a motion for new trial had passed was denial of the defendant's sixth amendment right to counsel and a critical stage of the proceedings), and *Cox v. State*, 797 S.W.2d 958 (Tex. App. – Houston [1st Dist.] 1990, no pet.) (holding that where a defendant was deprived of counsel during period in which motion for new trial had to be filed, mandate would issue disposing of appeal so that defendant could file motion for new trial) for the proposition that the thirty-day period to file a motion for new trial is a critical stage of the proceedings. *See also Callis v. State*, 756 S.W.2d 826, 827 (Tex. App. – Houston [1st Dist.] 1988, no pet.) (*citing Trevino v. State*, 565 S.W. 938, 941 (Tex. Crim App. 1978) (if appellate counsel is not appointed until after the 30 days in which to file a motion for new trial, the defendant has been denied his sixth amendment right to counsel during a critical sate [sic] of the prosecution).

The Fourteenth Court of Appeals in *Oldham* relied on the violation of the defendant's sixth amendment right to counsel and Rule 2(b) of the Texas Code of Criminal Procedures to set aside the defendant's sentence and notice of appeal and to permit the defendant to file a motion for new trial. *Oldham* was reversed on state procedural rule grounds after the petition in the instant case was filed. 977 S.W.2d 354 (Tx. Ct. Crim. App. 1998) (*en banc*), *cert. denied*, 119 S. Ct. 1121 (1999). More relevant for Petitioner's application for a federal writ, the Texas Court of Criminal Appeals stated,

> While we have held that a defendant is entitled to counsel at a hearing on a motion for new trial, Trevino v. State, 565 S.W.2d 938, 940 (Tex. Crim. App. 1978), this Court has yet to address the issue of whether a defendant is entitled to new

> counsel during the time limit for filing a motion for new trial to assist the defendant in preparing the motion. See Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 11.2(b) (2nd ed. 1992) (defendant's right to counsel at post-trial proceedings before the trial judge that challenge the conviction is not clear). This is the very question we left unanswered in Connor v. State, 877 S.W.2d 325, 326-27 (Tex. Crim. App. 1994). Some courts of appeals cases have held that there is such a right. See, e.g., Boyette v. State, 908 S.W.2d 56 (Tex. App. – Houston [1st Dist.] 1995); Oldham v. State, 889 S.W.2d 461 (Tex. App. – Houston [14th Dist.] 1994); Cox v. State, 797 S.W.2d 958 (Tex. App. – Houston [1st Dist.] 1990); Callis v. State, 756 S.W.2d 826 (Tex. App. – Houston [1st Dist.] 1988). However we are not asked today to address this issue and we will not do so, finding that the appellant has failed to show that she was denied counsel during the time limit for filing a motion for new trial.

Oldham, 977 S.W.2d at 360-61.

Among federal appellate courts, the First, Second and District of Columbia Circuits have held that the sixth amendment does not require appointment of counsel for a motion for new trial. *United States v. Trajeddini*, 945 F.2d 458, 470 (1st Cir. 1991) (and cases cited therein), *cert. denied*, 505 U.S. 1211 (1992). In *Menefield v. Borg*, 881 F.2d 696, 701 (9th Cir. 1989), the Ninth Circuit held that "an accused who requests an attorney at the time of a motion for a new trial is entitled to have one appointed." It concluded that under California law, a motion for new trial is a critical stage of the prosecution. *Id.* at 699. Nevertheless, in *Bell v. Hill*, 1999 WL 695197 (9th Cir. Sept. 9, 1999), the Ninth Circuit made clear that the

Menefield court did not look at Supreme Court law, but only at California law and that its holding was not dictated by Supreme Court precedent.

There is no Supreme Court pronouncement as to whether the period for filing a motion for new trial is a "critical stage" of the prosecution requiring effective assistance of counsel. "Reasonable contrary conclusions reached by other courts" indicate that a rule was not dictated by Supreme Court precedent. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

Under the AEDPA, this Court cannot grant a writ of habeas corpus unless the state court's conclusions[7] involved an unreasonable application of federal law *as determined by the Supreme Court*. An application of federal law is "unreasonable if it is so clearly incorrect that it would not be debatable among reasonable jurists. 22 U.S.C. § 2254(d)(1); *Nobles v. Johnson*, 127 F.3d 409, 418 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1845 (1998).

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[7] The state district court judge based his relevant conclusions on Texas state law:

> 20. While the applicant would have been entitled to relief if this issue had been raised on direct appeal, he is not entitled to relief on post-conviction writ of habeas corpus. *Ex parte Bronson*, 158 Tex. Crim. 133, 864 S.W.2d 117 (1952); *Thomas v. State*, 796 S.W.2d 196, 199 (Tex. Crim. App. 1990).
>
> 21. The applicant was not denied assistance of counsel during the time for filing a motion for new trial, as Paul Mewis remained attorney of record.

Ex. C, at p. 5, to Petition.

Because there is no Supreme Court precedent and because the state habeas court's findings of fact and conclusions of law and the Texas Court of Criminal Appeals' denial of state habeas relief are not so clearly incorrect that they would not be debatable among reasonable jurists, the Court

ORDERS that Petitioner's motion for summary judgment is DENIED and his application for federal writ of habeas corpus is DENIED with prejudice. The Court further

ORDERS that final summary judgment is GRANTED in favor of Respondent by separate order. Finally, because Petitioner has failed to demonstrate a denial of a federal right clearly established by Supreme Court precedent, the Court

ORDERS that a certificate of appealability under amended 28 U.S.C. § 2253(c)(2) shall not issue.

SIGNED this 29th day of September, 1999, at Houston, Texas.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN MAYO, Petitioner VS. GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	**Michael N. Milby, Clerk** CIVIL ACTION NO. H-97-3530

FINAL SUMMARY JUDGMENT

(Filed Sept. 30, 1999)

Pursuant to the memorandum and order signed on this day, the Court

ORDERS that FINAL SUMMARY JUDGMENT is GRANTED in favor of by Respondent Gary L. Johnson against Petitioner John Mayo and that Petitioner's application for federal writ of habeas corpus is DENIED with prejudice.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, This 29th day of September, 1999.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

December 1, 1997

Mr. Randolph L. Schaffer Jr.
1301 McKinney
Suite 3100
Houston, TX 77010

Re: John Mayo v. Texas
No. 97-716

Dear Mr. Schaffer:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

APPENDIX D

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

RE: Writ No. 35-090

STYLE: John Mayo

TRIAL COURT NO: 530604-A

(Filed Sept. 17, 1997)

This is to advise that the Court has denied without written order on the findings of the trial court after a hearing the application for writ of habeas corpus.

Troy C. Bennett, Clerk

RANDY SCHAFFER
1301 MCKINNEY
SUITE 3100
HOUSTON TX 77010

APPENDIX E

No. 530604-A

Ex Parte	§	IN THE 263RD
	§	
JOHN MAYO	§	DISTRICT COURT
	§	OF
Applicant	§	
	§	HARRIS COUNTY, TEXAS

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

(Filed July 29, 1997)

Having reviewed the application for writ of habeas corpus (including the attached exhibits and affidavits); the respondent's answer; the testimony at the evidentiary hearing held on July 24, 1997, and the official court documents, the Court makes the following findings of fact and conclusions of law:

1. Jacqueline Clewis Barnes, the first veniremember on the jury panel, represented on her juror questionnaire that she had never been accused in a criminal case.

2. Before the veniremembers were brought to the courtroom, the presiding judge in the central jury room asked whether they had ever been convicted of any felony or theft. Barnes either responded in the negative or remained silent; otherwise, she would have not accompanied the panel to the courtroom.

3. Neither the prosecutor nor defense counsel, Paul Mewis, asked the veniremembers whether they had been convicted of any felony or theft, in reliance on the answers in the jury questionnaires

and the knowledge that the veniremembers had already been qualified on this question in the central jury room.

4. Barnes served as a juror at trial.

5. At the time of trial, Barnes had a final conviction for misdemeanor theft. On November 9, 1977, she pled guilty to theft in Cause No. 500358 in County Criminal Court at Law Number 2 of Harris County, Texas; her punishment was assessed at three days in jail and a fine of $200.00.

6. Barnes prior conviction was discoverable as a public record in the office of the Harris County District Clerk.

7. During the trial, neither the applicant, Mewis, nor co-counsel, Cynthia Henley, knew that Barnes had a prior theft conviction.

8. Had Barnes disclosed her conviction during voir dire examination, Mewis would have challenged her for cause, as she was absolutely disqualified from jury service because of the theft conviction.

9. On March 8, 1991, the jury convicted the applicant and sentenced him to 50 years for aggravated sexual assault and 20 years for aggravated kidnapping.

10. Mewis contract with applicant provided that Mewis' representation would terminate with the jury's verdict.

11. On March 8, 1991, after sentencing, the applicant told Mewis that he wanted to appeal. Because Mewis did not handle appeals, he told the applicant to hire another lawyer.

12. Mewis took no further action on the case because he assumed that the applicant would hire another lawyer. Mewis did not investigate whether there was jury misconduct nor did he check the local criminal records of the jurors. Mewis did not investigate the issues for a motion for new trial nor did he file a motion for new trial. Neither did Henley, as she was hired only to assist Mewis during the trial.

13. Mewis did not move to withdraw as counsel because he was unaware that the law required him to continue to represent applicant following the conviction until such time as the court permitted him to withdraw or other counsel substituted in his place.

14. When Mewis had not heard from another lawyer after about three weeks, in his capacity as applicant's counsel, he met with the applicant in jail to determine whether the applicant had hired counsel for the appeal. Applicant said that he could not afford to do so.

15. On April 4, 1991, three days before the time expired to file a motion for new trial and notice of appeal, Mewis had the applicant brought to court, file notice of appeal, and sign an affidavit of indigency requesting the appointment of counsel on appeal.

16. On April 4, 1991, the court appointed Will Gray as appellate counsel and mailed him notice of the appointment. Gray did not learn of his appointment until the time had expired to file a motion for new trial.

17. Because no attorney discovered Barnes' theft conviction during the time for filing a motion for new trial, the issue of her disqualification was

not raised in a motion for new trial, the evidence was not developed at a hearing, and the issue was not raised on appeal.

18. A juror is absolutely disqualified if she has been convicted of theft. TEX. CODE CRIM. PROC. ANN. art. 35.19 (1989); **Frame v. State**, 615 S.W.2d 766 (Tex. Crim. App. 1981)

19. Had counsel filed a motion for new trial alleging that Barnes was absolutely disqualified from serving as a juror, the trial court would have been obligated to grant a new trial or the conviction would have reversed on appeal. **Thomas v. State**, 796 S.W.2d 196 (Tex. Crim. App. 1990); **State v. Holloway**, 886 S.W.2d 482 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd).

20. While the applicant would have been entitled to relief had this issue been raised on direct appeal, he is not entitled to relief on post-conviction writ of habeas corpus. **Ex parte Bronson**, 158 Tex. Crim. 133, 864 S.W.2d 117 (1952); **Thomas v. State**, 796 S.W.2d 196, 199 (Tex. Crim. App. 1990).

21. The applicant was not denied assistance of counsel during the time for filing a motion for new trial, as Paul Mewis remained attorney of record.

22. The Court recommends that habeas corpus relief be denied.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in Cause Number 530604-A and transmit them to the Court of Criminal Appeals, as provided by TEX.

CODE CRIM. PROC. ANN. art. 11.07 (Vernon Supp. 1997). The transcript shall include certified copies of the following documents:

A. the application for writ of habeas corpus, including any attached exhibits and affidavits;

B. the respondent's Answer;

C. the Findings of Fact, Conclusions of Law and Order;

D. the applicant's Objections to the Findings of Fact Conclusions of Law and Order;

E. the respondent's reply to the applicant's objections to the Findings of Fact, Conclusions of Law and Order (if any);

F. the transcript and statement of facts of the voir dire examination in Cause Number 530604;

G. the statement of facts from the evidentiary hearing in Cause Number 530604-A;

THE CLERK is further ORDERED to send a copy of this order to the applicant, his counsel and to the respondent.

Signed on this 25th day of July, 1997.

/s/ Woody Densen
WOODY DENSEN,
Presiding Judge
263rd District Court of
Harris County, Texas

APPROVED AS TO FORM

/s/ Randy Schaffer
Randy Schaffer
Counsel for Applicant

/s/ Ernest Davila
Ernest Davila
Counsel for Respondent

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20941

JOHN MAYO

Petitioner-Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 18, 2002)

(Opinion 03/28/02, 5 Cir., ___, ___ F.3d ___)

Before JONES, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petitioner for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.

and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.